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VP NATHAN & PARTNERS

v.

**SUBRAMANIAM GOVINDAN NAIR & ANOR
& ANOTHER APPEAL**

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COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
RAUS SHARIF JCA
ABU SAMAH NORDIN JCA

C

[CIVIL APPEALS NOS: P-01-69-01 & P-01-70-01]
24 JULY 2009

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LABOUR LAW: *Employment - Dismissal - Determination of - Whether a question of law or fact - Letters written by employees requesting to resign - Employees senior members of the Malaysian Bar - Whether employees had voluntarily resigned or unfairly dismissed - Whether High Court's determination of question as a matter of fact constituted jurisdictional error warranting appellate intervention*

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The appellant legal firm ('the firm') was twice instructed by one of its main clients – Kurnia – to prevent two of the firm's legal assistants ('employees') in the firm's Penang branch from handling Kurnia's files. These instructions were conveyed by the firm's principal partner to the managing partner of the Penang branch – Paul Manecksha ('Paul'). On 14 April 1997, at a meeting between

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the employees and Paul, the employees were informed that they faced bleak prospects in the firm unless Kurnia reconsidered its decision. At the meeting both employees agreed to resign on 31 July 1997. Subsequently, the firm received identical letters from the employees, dated 31 July 1997 and captioned 'Request for Resignation'. Paul replied to both letters on 5 August 1997 confirming that the employees had agreed to resign by 31 July 1997. However, both employees later filed a claim for reinstatement under s. 20 of the Industrial Relations Act 1967.

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The claims were referred to the Industrial Court which ruled that both employees had been dismissed without just cause or excuse and awarded backwages to the employees. The firm applied for judicial review in the High Court, which affirmed the dismissal award but quashed the award relating to backwages. The firm thus appealed to the Court of Appeal. The main issue in the

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appeals was whether the employees had resigned voluntarily.

Held (allowing the appeals with costs)**Per Low Hop Bing JCA:**

- (1) The courts in *Stanley Ng Peng Hon v. AAF Pte Ltd* and *Stephenson v. The London Joint Stock Bank Ltd*; dealt with the question of resignation as a question of law and not of facts exclusively. However, the question of law must be based on the specific facts in each case. *Stanley Ng Peng Hon v. AAF Pte Ltd* (refd); *Stephenson v. The London Joint Stock Bank Ltd* (refd).
- (2) In the instant case, the High Court's decision on the dismissal was exclusively dealt with as one of pure facts. However, the impugned decision of the Industrial Court clearly revolved around a question of law which was amenable to the jurisdiction of the High Court in an application for judicial review. (paras 21 & 22)
- (3) From the employees' letters expressly captioned 'Request for Resignation', there was no doubt that the employees themselves had requested to resign. The employees were at the material time advocates and solicitors of seven years' standing – senior members of the Malaysian Bar. Their request to resign had been expressed explicitly in their letters. Thus, the employees had voluntarily resigned and were not dismissed. The High Court's treatment of the question as one of pure facts, was an abdication of jurisdiction, which constituted a jurisdictional error capable of appellate correction. (para 23)

Bahasa Malaysia Translation Of Headnotes

Firma guaman perayu (firma) telah dua kali diperingatkan oleh salah satu klien utamanya – Kurnia – supaya menghalang dua peguam di firma cawangannya di Pulau Pinang ('pekerja') dari mengendalikan fail-fail yang melibatkan Kurnia. Peringatan ini telah disampaikan oleh rakankongsi utama firma kepada rakankongsi pengurus di cawangan Pulau Pinang – Paul Manecksha ('Paul'). Pada 14 April 1997, dalam satu mesyuarat di antara pekerja dan Paul, pekerja telah diberitahu bahawa mereka menghadapi masa depan yang gelap di firma kecuali jika Kurnia menimbang semula keputusannya. Di mesyuarat tersebut kedua-dua pekerja bersetuju untuk meletak jawatan pada 31 Julai 1997. Berikutnya, firma menerima surat-surat ber kandungan serupa dari pekerja, bertarikh 31 Julai 1997 dan bertajuk 'Permohonan Meletak Jawatan'. Paul menjawab kedua-dua surat pada 5 Ogos 1997 sambil mengesahkan

- A bahawa pekerja telah bersetuju untuk meletak jawatan pada 31 Julai 1997. Bagaimanapun, kedua-dua pekerja kemudian memfailkan tuntutan untuk diambil bekerja semula di bawah s. 20 Akta Perhubungan Perusahaan 1967. Tuntutan telah dirujuk ke Mahkamah Perusahaan yang memutuskan bahawa kedua-dua
- B pekerja telah dibuang kerja tanpa sebab dan alasan yang munasabah sekaligus mengawardkan gaji kebelakangan kepada pekerja. Firma memohon semakan kehakiman di Mahkamah Tinggi, berakibat mahkamah tersebut mengesahkan award pembuangan kerja tetapi mengeneipkan award gaji kebelakangan. Firma merayu
- C ke Mahkamah Rayuan dan isu utama yang berbangkit adalah sama ada pekerja telah meletak jawatan secara sukarela.

Diputuskan (membenarkan rayuan dengan kos)

Oleh Low Hop Bing HMR:

- D (1) Mahkamah di dalam *Stanley Ng Peng Hon v. AAF Pte Ltd* dan *Stephenson v. The London Joint Stock Bank Ltd* telah menangani persoalan meletak jawatan sebagai persoalan undang-undang dan bukan sebagai persoalan fakta secara eksklusif. Walaupun begitu, persoalan undang-undang harus didasarkan kepada
- E fakta-fakta spesifik setiap kes. *Stanley Ng Peng Hon v. AAF Pte Ltd* (dirujuk); *Stephenson v. The London Joint Stock Bank Ltd* (dirujuk).
- F (2) Dalam kes semasa, keputusan Mahkamah Tinggi berkaitan pembuangan kerja adalah terbit dari suatu perbincangan persoalan fakta secara eksklusif. Bagaimanapun, keputusan Mahkamah Perusahaan yang dicabar itu jelas berkisar di sekitar persoalan undang-undang yang tertakluk kepada bidangkuasa Mahkamah Tinggi melalui permohonan semakan kehakiman.
- G (3) Berdasarkan surat-surat pekerja bertajuk 'Permohonan Meletak Jawatan', tiada keraguan bahawa pekerja sendiri memohon untuk meletakkan jawatan. Pekerja pada waktu material adalah peguambela dan peguamcara yang berpengalaman selama tujuh
- H tahun – dan merupakan ahli kanan Bar Malaysia. Permohonan mereka untuk meletakkan jawatan telah dinyatakan secara jelas di dalam surat-surat mereka. Oleh itu, mereka telah meletak jawatan dan tidak dibuang kerja. Cara Mahkamah Tinggi menangani persoalan sebagai suatu persoalan fakta sepenuhnya, adalah satu kegagalan melaksanakan bidangkuasa, dan merupakan satu kesilapan bidangkuasa yang sekaligus mewajarkan pembetulan di peringkat rayuan.
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Case(s) referred to:

Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh [2000] 4 CLJ 77 CA (*refd*)

Mas Golden Boutique Sdn Bhd v. Md Zain Abu [1999] 3 CLJ 610 HC (*refd*)

National Union Of Plantation Workers v. Kumpulan Jerai Sdn Bhd [2000] 1 CLJ 681 CA (*refd*)

Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2000] 2 CLJ 244 CA (*refd*)

Quah Swee Khoo v. Sime Darby Bhd [2001] 1 CLJ 9 CA (*refd*)

Stanley Ng Peng Hon v. AAF Pte Ltd [1979] 1 MLJ 57 (*refd*)

Stephenson v. The London Joint Stock Bank Ltd [1902] 19 TLR 138 (*refd*)

Legislation referred to:

Industrial Relations Act 1967, s. 20

For the appellant - M/s Shearn Delamore & Co

For the respondent - M/s Jessy & Assoc

[Appeals from High Court, Pulau Pinang; Court Judicial Review Nos: 25-44-2000 & 25-43-2000]

[Editor's note: For the High Court judgment, please see VP Nathan & Partners v. Lingovan Dorairaj A Supiah & Anor [2002] 1 CLJ 248.]

Reported by Andrew Christopher Simon

JUDGMENT**Low Hop Bing JCA:****Appeals**

[1] These two related appeals *viz* CA No. P-01-69-01 and P-01-70-01 are lodged by the appellants, a firm of solicitors, ("the firm") against the decision of the Penang High Court in dismissing the firm's application for an order of *certiorari* to quash the award of the Industrial Court relating to the issue of dismissal without just cause or excuse ("the dismissal award").

Factual Background

[2] The employees commenced employment with the firm's branch in Penang, as legal assistants, drawing a starting salary of RM2,000 per month, on 8 December 1989 and 1 June 1990, respectively.

[3] The employees' duties and responsibilities were primarily in connection with road accident cases and included:

- A (1) Receiving instructions from clients and applying for all necessary documentation from authorities, securing medical and specialist reports;
- B (2) Interviewing all relevant persons in connection with the clients' claims;
- (3) Corresponding with opposing solicitors and agreeing upon documents;
- C (4) Attending on clients to agree upon defences or further conduct of the action;
- (5) Obtaining instructions from clients for negotiations or further conduct of the actions;
- D (6) Attending court to litigate the cases up to judgment, updating clients and advising them of the outcome of the trial and merits of appeal; and
- (7) Preparing memoranda of appeals, arguing appeals and notifying clients of the outcome.
- E [4] Sometime in early April 1997, Dato' VP Nathan, the firm's principal partner in Kuala Lumpur, was instructed by Kurnia Insurance Bhd ("Kurnia"), one of the firm's main clients, that Kurnia did not want the employees to handle Kurnia's files.
- F [5] Dato' Nathan conveyed Kurnia's instructions to the managing partner of the firm's branch in Penang, Mr. Paul Manecksha, who then verbally informed the employees of the same.
- G [6] However, the employees were allowed to continue to attend to the Kurnia as well as non-Kurnia files. When Kurnia discovered that the firm had failed to comply with their instructions, Kurnia was annoyed.
- H [7] Kurnia repeated the instructions to Dato' Nathan to preclude the employees from handling the Kurnia files. Again Dato' Nathan conveyed the instructions to Mr. Manecksha.
- I [8] On 14 April 1997, Mr. Manecksha had a meeting with the employees and informed them that Kurnia had insisted on precluding them from handling the Kurnia files. In the course of discussion, the employees enquired about their prospects in the

firm. Mr. Manecksha informed them that it would affect them in terms of their future increments and bonuses, with dim prospects of partnership, unless Kurnia reconsidered its decision. The employees said that if that was the situation, they might as well leave the firm and seek employment elsewhere. Mr. Manecksha informed the employees that they need not leave immediately as they would have to provide the firm with three months' notice of resignation, and suggested that they could leave on 31 July 1997 to which the employees agreed.

[9] The firm received the employees' letters, which were identical in content, dated 31 July 1997 and captioned "REQUEST FOR RESIGNATION", with immediate effect. Mr. Manecksha replied vide two letters, both dated 5 August 1997, confirming that the employees had "agreed to resign by 31 July 1997" (see pp. 183 to 186 of the appeal record).

[10] However, the employees made their claim for reinstatement under s. 20 of the Industrial Relations Act 1967. The claims were referred to the Industrial Court which ruled that the employees were dismissed without just cause or excuse, and awarded backwages to the employees.

[11] The firm then filed an application for judicial review, to quash the entire award of the Industrial Court.

[12] The High Court affirmed the dismissal award ("the dismissal decision"), but held that the Industrial Court had committed jurisdictional error in failing to take into account post-dismissal earnings and accordingly quashed the award relating to backwages.

[13] This is the firm's appeal against the dismissal decision of the High Court.

Voluntary Resignation Or Dismissal?

[14] The firm's learned counsel Mr. N Sivabalah (assisted by Ms E Reena) submitted that the High Court failed to appreciate that there was no forced resignation and hence no dismissal, as the employees had resigned voluntarily. *Stanley Ng Peng Hon v. AAF Pte Ltd* [1979] 1 MLJ 57 was cited in support.

[15] The employees' learned counsel Ms Pravin Kaur Jessy contended to the contrary ie the employees were forced to resign and hence dismissed without just cause or excuse. Reference was also made to, *inter alia*, *Stanley Ng Peng Hon, supra*.

- A [16] In our judgment, the question for determination in the instant appeal is: Given the above factual background, did the employees resign voluntarily?
- B [17] The answer to the above question may be ascertained by an analysis of the common authority.
- C [18] In *Stanley Ng Peng Hon, supra*, the employee testified that the company's manager came to the employee's office and said, "Stanley, I have to ask you for your resignation." The employee asked for reasons but the manager refused to disclose any reason. The manager then handed the employee an envelope and said, "Stanley, I think you will find everything there." The employee maintained that he was shocked, and pleaded with the manager, but to no avail. The employee was told to go home in the company's car and to return it to the company's service station the next day. The employee claimed that he never had any intention of resigning; that the so-called resignation was a dismissal forced on him, and that in the letter he wrote the next morning, he wrongly used the word "resignation" instead of "termination of employment". The manager, on the other hand, stated that he did not recollect asking the employee for his resignation, but had mentioned to the employee that it was better for the employee to look for other work for which he was more suited. The manager admitted that the employee did ask him specifically what the problems were but the manager declined to answer, because the manager wanted to give the employee the opportunity to resign. He admitted that if the employee had not resigned, he would have dismissed him.
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- G [19] Choor Singh J accepted the employee's version and had no doubt that when the manager asked for the employee's resignation, he was in effect dismissing the employee from his appointment, as it was a polite way of telling the employee that he was being dismissed. The resignation was obtained under compulsion and so there was no resignation in law. The learned judge referred to *Stephenson v. The London Joint Stock Bank Ltd* [1902] 19 TLR 138; CA 20 TLR 8. In essence, the facts there reveal that the employee entered the service of the bank as a clerk. He signed a form of rules and regulations for granting retiring allowances to the officers of the bank. The second rule provided that such officer retiring with the consent of the directors should receive an allowance at the rate of one-third of
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the annual amount of his salary at the time he so retired. Under the fifth rule, no retiring allowance whatever was to be granted to any officer who was dismissed from the service of the bank. The employee had endorsed a promissory note which was made by a Mr. Horace Sedger. This fact came to the knowledge of the bank owing to the note being discounted at one of the branches of the bank, and thereupon the bank called upon the employee for an explanation. The employee stated that he had been promised the sum of £25 by Mr. Horace Sedger for endorsing the note, and that he was unaware that Mr. Sedger was other than a person of sound financial position. Subsequently, the employee received a letter from the secretary to the bank in regard to the matter of the promissory note. The letter contained the words "you are required to resign your appointment to the bank". The employee then wrote to the secretary resigning his appointment, and sought a declaration that he was entitled to a pension from the bank, contending that he had retired and was not dismissed. Wright J found for the bank, holding that the employee had not retired but had been dismissed. On appeal, the English Court of Appeal held that Wright J had come to a perfectly correct decision.

[20] It is abundantly clear to us that in *Stanley Ng Peng Hon, supra*; and *Stephenson, supra*, the respective Courts had dealt with the question of resignation as a question of law, and not of facts exclusively. Of course, the determination of this question of law must be based on the specific reference to the facts prevailing in each particular case.

[21] Reverting to the dismissal decision of the High Court, which is now subject to the instant appeals, we note that the learned judge had dealt with the dismissal decision exclusively as one of pure facts. In this regard, the High Court held that:

- (1) It is not open for a court of judicial review proceedings to exercise appellate powers: *Quah Swee Khoo v. Sime Darby Bhd* [2001] 1 CLJ 9 CA;
- (2) If a judge, to whom an application for an order for *certiorari* is made, enquires into and disturbs a finding of facts, he is actually exercising appellate functions: *Quah Swee Khoo, supra*;

- A (3) The finding of facts is outside the High Court's judicial review jurisdiction and the High Court is bound to accept such finding of the Industrial Court: *Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh* [2000] 4 CLJ 77 CA;
- B (4) It is wrong for the High Court in a supervisory role to substitute its finding of facts when such role is within the province of the Industrial Court: *National Union Of Plantation Workers v. Kumpulan Jerai Sdn Bhd* [2000] 1 CLJ 681 CA; and
- C (5) A finding of fact by the Industrial Court is immunized from judicial review: *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2000] 2 CLJ 244 CA. (See also *Mas Golden Boutique Sdn Bhd v. Md Zain Abu* [1999] 3 CLJ 610).
- D [22] While we are of the view that the above principles are trite, we must emphasise that the impugned dismissal award of the Industrial Court clearly revolves around a question of law which, unlike a finding of facts, is amenable to the jurisdiction of the High Court in an application for judicial review.
- E [23] When we refer specifically to the employees' letters which expressly stated their "REQUEST FOR RESIGNATION", there can be no doubt whatsoever that the employees themselves had requested to resign. They were not forced to resign. It is singularly
- F significant to note that the employees were on the material dates advocates and solicitors of some seven years standing. That is a professional qualification which enables them to accept two qualified persons as chambering students for subsequent admission to the Malaysian Bar. The employees are senior learned members
- G of the Bar. The employees have expressed their "REQUEST FOR RESIGNATION" in their letters explicitly. We are of the view that in law, the employees had voluntarily resigned and were not dismissed. With the utmost respect, the learned judge's treatment of the question as one of pure facts is an abdication of
- H jurisdiction, constituting a jurisdictional error which is capable of being corrected on appeal.

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Conclusion

[24] On the foregoing grounds, we hold that there are merits in these appeals. We therefore set aside the dismissal decision of the High Court and substitute it with an order of *certiorari* to quash the dismissal award of the Industrial Court. The firm is awarded total costs of RM10,000 here and in the court below. Deposits in the two appeals to the firm on account of the costs.

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